No. 84-1485.

Supreme Court, U.S.
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In the

Supreme Court of the United States.

OCTOBER TERM, 1985.

JOHN MORAN,
PETITIONER,

v.

BRIAN K. BURBINE,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for the National Association of Criminal Defense Lawyers and Association of Trial Lawyers of America as Amici Curiae Supporting Respondent.

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INTEREST OF THE AMICI CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a national bar association, headquartered in Washington, D.C., whose membership includes several thousand attorneys involved in fulltime criminal defense. NACDL intervenes as amicus curiae only in cases of demonstrable significance to the administration of criminal justice.

The Association of Trial Lawyers of America (ATLA) is a national bar association with approximately 55,000 members, many of whom represent criminal defendants. ATLA intervenes as amicus curiae only in those criminal cases which it believes present issues of national importance.

This case presents one of those issues. The United States Court of

Appeals for the First Circuit held that a defendant in police custody cannot be found to have knowingly and intelligently waived his Fifth Amendment right to consult with counsel prior to any interrogation and to have counsel present at any interrogation where the police wrongfully withheld crucial information from a young, inexperienced and poorly educated defendant. The crucial information here was that counsel had called the police station, was available and stood ready to be at defendant's side if an interrogation or a lineup took place, and had been affirmatively and deceptively told that no interrogation would be undertaken that night. This information would not only have advised defendant of the ready availability of his counsel, but would also have informed defendant that the

police were not being truthful to him. The decision of the First Circuit, firmly grounded on established principles for determining whether a purported waiver is knowing and intelligent, should be affirmed.

SUMMARY OF THE ARGUMENT

The constitutional right to consult with counsel before submitting to custodial police interrogation is well-established. Although this right may be waived, an effective waiver must be voluntary, knowing and intelligent. The court below properly held that there was no knowing and intelligent waiver of the right to consult with counsel, where the police wrongfully concealed from the young and inexperienced suspect that his attorney had called the police station inquiring about his situation, that she

had expressed her willingness and desire to be present if he was to be interrogated or put in a lineup, and that she was deceptively assured that he would not be interrogated that evening.

Petitioner's arguments that the holding below needlessly extends and complicates Miranda v. Arizona, 384 U.S. 436 (1966), and that it will improperly interfere with the ability of a suspect to waive his rights or the ability of the police to interrogate suspects, are groundless and based on a misapprehension of what the First Circuit actually held. In fact, while the decision below in no way extends Miranda, reversal of that decision will seriously, perhaps devastatingly, undermine the constitutionally protected right of an arrested person to consult with counsel before submitting to police interrogation.

NO EFFECTIVE WAIVER OF
RIGHTS CAN BE FOUND IN THIS CASE

Miranda held that an accused has a Fifth and Fourteenth Amendment right to consult with counsel prior to questioning and to have counsel present during custodial interrogation. Miranda v. Arizona, 384 U.S. at 471; Edwards v. Arizona, 451 U.S. 477, 482 (1981). This component of the Fifth Amendment privilege against compulsory self-incrimination flows from a recognition of the vital role the defense attorney plays in "the administration of criminal justice under our Constitution", Miranda v. Arizona, 384 U.S. at 481; Fare v. Michael C., 442 U.S. 707, 722 (1979), and the particularly effective role that counsel can play to prevent police overreaching. Miranda v. Arizona, 384

U.S. at 466.

While a person may waive the right to consult with counsel prior to interrogation or to have counsel present at interrogation, such waiver must not only "be voluntary, but must also constitute a knowing and intelligent relinquishment" of the right. Edwards v. Arizona, 451 U.S. at 482; Oregon v. Bradshaw, 462 U.S. 1039, 1046 (1983). The court must inquire

> into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forego his rights to remain silent and to have the assistance of counsel.

Fare v. Michael C., 442 U.S. at 725. See Oregon v. Bradshaw, 462 U.S. at 1046; Edwards v. Arizona, 451 U.S. at 482; North Carolina v. Butler, 441 U.S. 369, 374-375 (1979); Johnson v. Zerbst,

304 U.S. 458, 464 (1938). There is a heavy burden upon the government to demonstrate waiver of the right to the advice of counsel, see Miranda v. Arizona, 384 U.S at 475, and

> any evidence that the accused was threatened, tricked, or cajoled into a waiver will. . . show that the defendant did not voluntarily waive his privilege.

Id. at 476.

After assessing the totality of the circumstances here, the court below concluded that the government had not met its heavy burden of demonstrating an effective waiver. The stark and disturbing facts of the case show that the First Circuit was clearly correct.

First, defendant was young, indigent, poorly educated, and relatively inexperienced in the criminal

justice system.[1] Although he had been arrested once before, and counsel had been retained for him through the Public Defender's Office, he had not yet met with counsel concerning that charge. These factors show the significant risk that defendant's free will could be easily overborne by experienced police officers.

Second, although defendant responded to a single officer's questions concerning his nickname prior to receiving his Miranda warnings, he refused to answer any questions immediately after the warnings were first provided.[2] Once defendant invoked his rights, interroga-

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[1] See Edwards v. Arizona, 451 U.S. at 483 (background and experience of the accused is relevant to the issue of waiver); Johnson v. Zerbst, 304 U.S. at 464 (1938) (similar).

[2] See Burbine v. Moran, 753 F.2d 178, 180 (1st Cir. 1985).

tion should have ceased entirely.[3]

Nonetheless, interrogation was soon resumed, under particularly intimidating circumstances. Yet, confronted by five officers only three hours after he had first invoked his rights, Burbine still refused to waive those rights.

Although questioning was again terminated and it was then after 9:00 p.m., defendant was not returned to his cell for the night. Instead he was kept in an interrogation room, as he had been for almost six hours. The message to the defendant could not have been clearer. The police had no intention of ceasing their efforts to interrogate him

[3]See Miranda v. Arizona, 384 U.S. at 473-474 ("If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease"); cf. Michigan v. Mosley, 423 U.S. 96, 105-106 (1975).

or of honoring the rights they had informed him he possessed.[4]

Finally, and critically, defendant was not informed that his counsel had called to inquire about his situation, that she expressed her desire to be present at any interrogation, and that she was assured that he would not be interrogated that evening. The impact of this police action is fourfold.

First, failing to tell Burbine that an attorney had called about his situation could only exacerbate his sense of isolation and hopelessness. Defendant was led to believe,

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[4] The amicus brief of the United States appears to recognize the significance of a defendant's initial invocation of the right to silence. See Brief for the United States at fn 16. Amici here agree with the United States as to the importance of an initial invocation of the right to silence, and point out that exactly such an invocation occurred in this case.

erroneously, that no help would be forthcoming -- no help from his sister and no help from an attorney. See Miranda v. Arizona, 384 U.S. at 450.

Second, concealing from Burbine that his attorney had not simply made a half-hearted inquiry into his situation but, rather, had told the police that she desired to be present during any interrogation, left him with no idea that his advocate was prepared to consult with him immediately and to be present during any interrogation.[5]

Third, had defendant known that his attorney had been assured that there

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[5]Obviously, telling defendant that his attorney was prepared to attend a night-time interrogation would have impressed upon him that he did, in fact, have the ability to effectuate his right to consult with counsel and to have counsel present at any interrogation. It would also have informed him that counsel believed her presence was important.

would be no interrogation that night he would have understood why no help was forthcoming, and he would have been warned that the police were not acting as they had told his attorney they would.

Fourth, misleading the attorney into believing that there would be no interrogation that night lulled her into inaction and stopped any additional attempts to ensure that Burbine knew of her immediate availability and her desire to be present at any interrogation.

In sum, defendant was compelled to act with an erroneous understanding of the true nature of his situation, created by the authorities, and without information crucial to a knowing and intelligent decision. Although amici do not suggest that a suspect must be told everything arguably relevant to the

decision to waive in order for the waiver to be valid, amici do contend that, at the least, a knowing and intelligent waiver of the right to consult with counsel cannot be found when the police stand between the suspect and the outside world and mislead him by withholding critical information concerning his attorney's availability and desire to be present.

Indeed, any other conclusion would render Miranda a form without substance. In setting out specified warnings, Miranda requires the provision of certain facts which are, by definition, material to a person's decision to waive his Fifth Amendment privilege. Most prominent among these are that the person need not answer police questions and that the person may consult with an attorney. To then find that the police

may withhold information essential to effectuate those rights - namely that a lawyer is ready and willing to assist - abrogates the essence of Miranda. Miranda warnings are not simply words to be mechanically intoned and no more. Where defendant invokes those rights and counsel is figuratively at the door the police must not take action that keeps defendant from his attorney.

The First Circuit held that a knowing and intelligent waiver of defendant's right to consult with counsel will not be found under the stark facts of this case. This holding is reasonable and necessary to protect a defendant's right to seek advice of counsel, as well as to protect the integrity of the interrogation process and defense counsel's role in that process.

> Deliberate or reckless misleading of an attorney, who has a legitimate, professionally ethical interest in a suspect in custody and who expresses to the police a desire to be present at any interrogation of the suspect, combined with a police failure to communicate that exchange to the suspect.... vitiates any claim that a waiver of counsel was knowing and voluntary.

Burbine v. Moran, 750 F.2d at 187.

And, as the court emphasized, its ruling is limited. A defendant is still free knowingly and intelligently to waive his Miranda rights, and is free, following such a waiver, to incriminate himself without the advice of counsel. But defendant and his lawyer must not be affirmatively misled by the police. Id. In addition, defendant need be informed of counsel's interest and availability only where there exists some real and continuing relationship between

the attorney and the client. Id.

THE PETITIONER AND AMICI SUPPORTING PETITIONER APPEAR SERIOUSLY TO MISAPPREHEND THE HOLDING BELOW

Petitioner and amici supporting petitioner level various criticisms at the holding of the First Circuit which, when that holding and the facts here are considered with care, appear aimed at some other opinion. They argue that: 1) following the First Circuit's holding, it is no longer the defendant's free choice, but instead the lawyer's, that will decide whether the defendant waives Fifth Amendment rights; 2) the holding below will hopelessly obscure the bright line Miranda rule; 3) the holding below unnecessarily adds to Miranda by requiring that before interrogation the police provide defendant with extensive information concerning

the consequences of his statements; and 4) police will hereinafter be handicapped in their efforts to interrogate by innundations of meddlesome inquiries by attorneys with little or no relationship to persons in custody.

None of the criticisms can withstand scrutiny.

The contention that the First Circuit's opinion opens the door to an attorney's waiving the accused's Fifth Amendment rights[6] is simply groundless. Nothing in the holding removes from the defendant his personal Fifth Amendment right and his - and only his - ability to waive that right, and nothing in the holding provides counsel with a new role

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[6] See, e.g., Petitioner's Brief at 31-32; Brief Amici Curiae Submitted by the States (hereinafter "States' Brief") at 20; Brief Amici Curiae of Americans for Effective Law Enforcement, Inc. at 5.

in effecting or preventing that waiver. The holding simply re-affirms the established principle that a waiver of the right to seek advice of counsel must be knowing and intelligent.[7] Properly placing the burden upon the government to establish waiver, and properly and carefully reviewing the facts and circumstances of this case, the First Circuit reasonably concluded that a knowing waiver could not be found where the specific and crucial information that his counsel wished to be present during interrogation was withheld by the police from the defendant and where counsel was told that no interrogation would occur.[8] The court's unremarkable

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[7] Petitioner and its amici, not surprisingly, generally overlook the fact that a waiver must be knowing and intelligent as well as voluntary.

[8] The First Circuit's approach was

holding, far from providing counsel with a new and unprecedented right to waive, is that, assuming the accused and his counsel have been treated with a modicum of honesty, the accused remains free to effect whatever waiver he chooses.

As to the suggestions that the holding below will drastically blur the bright lines of Miranda,[9] it need only be pointed out that what is "bright-line" about Miranda is the fact that warnings must be given. There is no

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thus in line with the majority of opinion. See Commonwealth v. Sherman, 389 Mass. 287 (1983); Weber v. State, 457 A.2d 674 (Del. 1983); People v. Smith, 93 Ill.2d 179 (1982), cert. denied 461 U.S. 937 (1983); State v. Matthews, 408 So.2d 1247 (La. 1982); Commonwealth v. Hilliard, 471 Pa. 318 (1977); State v. Haynes, 41 Or.App. 465 (1979) (en banc), cert. denied 446 U.S. 945 (1980); State v. Jones, 19 Wash.App. 850 (1978).

[9] See, e.g., States Brief at 15; Petitioner's Brief at 13 et seq.

question that, with few exceptions,[10] incriminating statements elicited from a defendant without the prior administration of the Miranda warnings will be held inadmissible as violative of the Fifth Amendment. But, where the government alleges a waiver of Miranda warnings, the courts have been faced not with bright lines, but with the need to inquire, post hoc, into all the relevant circumstances to determine whether the waiver was voluntary, knowing, and intelligent.

The First Circuit has done nothing to complicate the inquiry. It has merely stated, as should be expected, that among the relevant circumstances to

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[10] See New York v. Quarles, 104 S.Ct. 2626 (1984) (establishing a limited public safety exception to the requirement that the suspect in custody be provided Miranda warnings prior to interrogation).

be inquired into is the information provided to or withheld from defendant concerning his attorney's inquiries, and the actions, if any, taken by the police to discourage the attorney's attempts to contact defendant.

The related contention put forward by petitioner and its amici, that the First Circuit approach will needlessly burden the police and improperly expand Miranda by requiring that police "provide suspects with all information relevant to the waiver decision," Brief of the United States at 20, can be similarly disposed of, since the opinion, quite simply, does no such thing. The police are hardly required to give "all information relevant to the waiver situation" - rather, they merely are admonished not to deceptively

withhold certain crucial information. This admonition is, as the case law demonstrates, hardly novel.[11]

Finally, the suggestion that police work will be rudely interrupted by meddlesome attorneys claiming to represent persons in custody -- perhaps lawyers making the claim by way of "a nationally computerized list", Petitioner's Brief at 32 - is obviously nonsensical, in light of the First Circuit's clear limitation of its holding to attorneys who demonstrate a substantial relationship with the defendant. See Burbine v. Moran, 753 F.2d at 87.

It should be noted that a general

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[11]See, e.g., Commonwealth v. Hilliard, supra; Commonwealth v. McKenna, 355 Mass. 313 (1969); State v. Haynes, supra; cf. United States v. Wedra, 343 F.Supp. 1183 (S.D.N.Y. 1972) (attorney deceptively assured client would not be questioned.)

implication of all these arguments - and a suggestion that permeates the briefs - is that defense attorneys are interlopers in the law enforcement process who must be kept from contact with their clients lest they interfere with the police right to interrogate. However, Miranda makes it unequivocally clear that a person in custody has the right to consult with counsel prior to any interrogation and has the right to have counsel present at such interrogation in order that counsel may serve its important prophylactic function.[12]

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[12]This Court should again reject here the position that police misconduct can be sanitized by the subsequent provision of Miranda warnings -- a position that has been repeatedly rejected by this Court in the context of the Fourth Amendment. See, e.g., Brown v. Illinois, 422 U.S. 590 (1975); Taylor v. Alabama, 457 U.S. 687 (1982).

REVERSAL OF THE OPINION BELOW WILL ENCOURAGE POLICE LAWLESSNESS THAT UNCONSTITUTIONALLY INTERFERES WITH DEFENDANTS' RIGHTS TO SEEK ADVICE OF COUNSEL

Both petitioner and its amici completely ignore the impact of reversing the decision below. Reversal will place a judicial imprimatur upon official dishonesty that will serve to undermine a defendant's right to seek the advice and presence of counsel in connection with custodial interrogation despite the recognition that counsel's presence serves an important

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Similarly, this Court has rejected the position that "consent" obtained through misleading acts of the police can be deemed voluntary for constitutional purposes. See, e.g., Bumper v. North Carolina, 391 U.S. 543 (1968). It should now reject the contention that the right to consult with counsel and have counsel present at custodial interrogation can be abrogated by affirmative misrepresentations to defense counsel and concealment of counsel's efforts to reach the client prior to interrogation.

prophylactic function. It will serve to exclude counsel from consulting the client until the police decide that access is appropriate. The message will be that it is permissible for the police to mislead defense attorneys while they conceal crucial information from young, inexperienced and poorly educated clients, who are repeatedly questioned until they "waive" their right to consult counsel. If the police can misrepresent with impunity their intent to interrogate a suspect, what is to preclude them from misrepresenting to counsel when interrogation will occur, where it will occur, or even whether the client is in custody? Will the police be able to deny access to an attorney who arrives at the station requesting access to a client, to "forget" to mention that an attorney is at the door?

In short, can police actions that result in the complete isolation of a suspect until the police deem that consultation with counsel is appropriate be held permissible?

Amici submit that this path must be rejected. The Fifth Amendment provides a suspect in police custody with the right to consult with counsel. Miranda expressly recognized the salutary purpose of the presence of counsel during the interrogation process.[13] That right will be rendered meaningless and that purpose will be totally thwarted if the police can exclude counsel at will by misrepresenting the suspect's status to the attorney.

Reversal here will unfairly undermine the rights of the indigent or

[13] See Miranda v. Arizona, 384 U.S. at 469-470.

those inexperienced with the criminal justice system who do not have an attorney to call directly, but who call a family member or friend to obtain legal assistance. An attorney contacted directly is likely to advise the client to await the attorney's arrival before agreeing to answer questions, and is likely to be at the police station as soon as possible.[14] A person who must rely on the intervention of others has no assurances that help is on the way and no preliminary advice. Thus, it is likely to be the indigent or those inexperienced with the criminal justice system - those persons most likely to

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[14] It should be noted that the attorney, upon consideration of the best interests of the client, often advises cooperation with the police, as evidenced, inter alia, by the number of guilty pleas entered.

need the early intervention of counsel - who will be left to fend for themselves.[15]

CONCLUSION

The court below simply held that the police cannot affirmatively act to negate the protections of the Miranda warnings by concealing information that is central - not peripheral or arguably relevant - to a knowing and intelligent decision to waive the rights they provide. This decision should be

[15]The importance of early intervention by counsel and the recognition of the importance of the custodial interrogation phase has recently been emphasized by the increasing numbers of public defender offices which have begun instituting "on call" systems to assure that persons who are taken into custody outside of normal business hours will be able to receive assistance of counsel at that crucial stage.

affirmed.

Respectfully submitted,

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